SUPREME COURT, U.S.
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No. _____

In The
Supreme Court of the United States

MARIBEL DELGADO, as Personal Representative of the Estate of Ruben Delgado, M.D.,

Petitioner,

v.

REEF RESORTS LTD., d/b/a RAMON'S VILLAGE RESORT,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a state, consistent with the Privileges and Immunities Clause of Article IV, § 2, discriminate against nonresidents by allowing only residents to sue under the doing business provision of the state's long-arm statute?

2. Does a scuba diving accident in navigable waters caused by the negligence of the crew of a seagoing vessel constitute a maritime tort giving rise to admiralty jurisdiction?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Maribel Delgado requests that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The April 13, 2004 opinion of the Court of Appeals in the present matter is reported at 364 F.3d 642 (5th Cir. 2004) and is reproduced in the appendix to this petition, Pet. App. 1.

JURISDICTION

The opinion of the Court of Appeals was issued on April 13, 2004. Pet. App. 1. A timely petition for rehearing en banc was denied on June 29, 2004. Pet. App. 27. This Court's

jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). Because 28 U.S.C. § 2403(b) may apply, inasmuch as this case challenges the constitutionality of the Court of Appeals' interpretation of a Mississippi statute, the notification required by Rule 29.4(c) has been made and the Attorney General of Mississippi has been served with this petition. The lower courts in this case did not make any certification to the Mississippi Attorney General under 28 U.S.C. § 2403(b).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

Article IV, § 2 of the United States Constitution provides in part:

> The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

Miss. Code Ann. § 13-3-57 provides in part:

> Any nonresident person, firm, general or limited partnership, or any foreign or other corporation not qualified under the Constitution and laws of this state as to doing business herein, who shall make a contract with a resident of this state to be performed in whole or in part by any party in this state, or who shall commit a tort in whole or in part in this state against a resident or nonresident of this state, or who shall do any business or perform any character of work or service in this state, shall by such act or acts be deemed to be doing business in Mississippi and shall thereby be subjected to the jurisdiction of the courts of this state. Service of summons and process upon the defendant shall be had or made as is provided by the Mississippi Rules of Civil Procedure.

Federal Rule of Civil Procedure 4(k)(2) provides:

> If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service is also effective, with respect to claims arising under federal law, to establish personal jurisdiction over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state.

STATEMENT OF THE CASE

This lawsuit was originally filed in the Circuit Court of Hinds County, Mississippi, by the surviving spouse of Dr. Ruben Delgado for his wrongful death, only to be removed to the United States District Court for the Southern District of Mississippi. Dr. Delgado was vacationing with his family at Ramon's Village, a resort in Belize owned by the Respondent, Reef Resorts, Limited, when he was lost at sea while scuba diving with his two sons on a trip sponsored and supervised by Reef Resorts. Pet. App. 2. The case was filed in Mississippi because Reef Resorts, while a Belize company, conducts its United States operations in Laurel, Mississippi, where it solicits customers for the resort, makes reservations through a toll-free number, and maintains a business office, and where its executive vice-president for operations and at least two of its directors live. (Record, pp. 51-90).

An amended complaint alleging personal jurisdiction under both the Mississippi long-arm statute, Miss. Code Ann. § 13-3-57, and Fed. R. Civ. P. 4(k)(2) was filed following removal. However, the District Court dismissed Reef Resorts for lack of personal jurisdiction. Pet. App. 8, 13. It denied the motion to dismiss filed by the other defendant, the Headrick Companies, Inc., a Mississippi corporation which is the parent company of Reef Resorts, and entered judgment for Reef

Resorts under Fed. R. Civ. P. 54(b). Pet. App. 17, 23. The United States Court of Appeals for the Fifth Circuit affirmed the dismissal of Reef Resorts, holding that (1) because the Delgados are from Florida rather than Mississippi, they cannot invoke the doing business prong of the Mississippi long-arm statute as the Fifth Circuit has interpreted it, and (2) a claim arising from a scuba diving accident supervised from a seagoing vessel in navigable waters does not fall within admiralty, and therefore personal jurisdiction is unavailable over Reef Resorts under Fed. R. Civ. P. 4(k)(2) (providing for personal jurisdiction in "claims arising under federal law" where no personal jurisdiction exists under state law). Pet. App. 1, 3-4, 6.

As to the first holding, the Fifth Circuit said it was bound by prior Circuit precedent in which "[t]his court has, on numerous occasions, interpreted the Mississippi statute to mean that non-residents may not sue non-resident corporations doing business in Mississippi." *Id.* at 3. The Court reached this holding despite the fact that the doing business portion of the Mississippi long-arm statute, Miss. Code Ann. § 13-3-57, makes no distinction between residents and nonresidents, and despite the fact that the courts of Mississippi have never addressed the question. In addition, the Fifth Circuit, again following prior precedent, held that this interpretation of the Mississippi statute "does not deny a nonresident plaintiff privileges and immunities secured under the Constitution" by Art. IV, § 2. Pet. App. 4.

As to the second holding, the Fifth Circuit held that the case does not fall within the scope of admiralty jurisdiction, saying the "recreational scuba activity in this case did not affect maritime commerce, and . . . [was] not connected with traditional maritime activity." *Id.* at 6.

A motion for rehearing en banc was denied, Pet. App. 27,

and this petition follows. The case against Reef Resorts' parent company, Headrick, remains pending in the District Court, where proceedings have been stayed pending the outcome of this appeal. *Id.* at 26.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFUSION THAT EXISTS OVER WHETHER STATES MAY, WITHOUT VIOLATING THE PRIVILEGES AND IMMUNITIES CLAUSE OF ART. IV, § 2, DISCRIMINATE AGAINST NONRESIDENTS BY PREVENTING THEM FROM SUING IN STATE COURTS IN SITUATIONS WHERE RESIDENTS CAN SUE.

Article IV, § 2, clause 1 of the U.S. Constitution provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." This Court has expressed the underlying principle of that clause as follows: "With respect to [certain] basic and essential activities, interference with which would frustrate the purposes of the formation of the Union, the States must treat residents and nonresidents without unnecessary distinctions." *Baldwin v. Fish and Game Comm'n of Montana*, 436 U.S. 371, 387 (1978). The Court's decisions have made it clear that these "basic and essential activities" include, among other things, "access to courts." *Id.*

At one time, this Court analyzed access to court issues by distinguishing between residency and citizenship, holding that a state could close its courthouse doors to nonresidents since the words of Art. IV, § 2 speak of citizenship and not residency. *Douglas v. New York, New Hampshire & Hartford R.R.*, 279 U.S. 377 (1929); *Missouri ex rel. Southern Railway v. Mayfield*, 340 U.S. 1 (1950). *Douglas* employed this reasoning to uphold

a New York statute allowing state courts to use their discretion to dismiss suits by nonresidents but not those by residents. Citing *Douglas, Mayfield* confirmed that states have this power irrespective of Art. IV, § 2, so long as the discrimination is directed at nonresidents and not explicitly at noncitizens. But the Court has not addressed this specific issue since 1950 and has not analyzed it in light of the subsequent cases that clearly discarded the distinction between citizens and residents. *See Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 278 n.6 (1985) ("[u]nder this Clause, the terms 'citizen' and 'resident' are used interchangeably").

The lower courts need guidance on this question. Because of the 1929 and 1950 precedents of *Douglas* and *Mayfield*, the Supreme Court of Texas upheld a Texas forum non conveniens statute that gave Texas residents greater access to Texas courts than nonresidents. "Although . . . the distinction between residents and citizens is in disfavor in most contexts, we are nonetheless bound to follow *Douglas* because it has never been overruled by the Supreme Court." *Owens Corning v. Carter*, 997 S.W.2d 560, 571 (Tex. 1999), *cert. denied*, 528 U.S. 1005 (1999).

In the present case, the Fifth Circuit also rejected a privileges and immunities challenge to discrimination against out-of-state residents in access to courts, although it did not analyze the viability of the *Douglas-Mayfield* distinction. Indeed, the Fifth Circuit did no analysis at all. Instead, it simply said it was bound by prior circuit precedent on the Art. IV, § 2 question:

> Once again we are bound by Fifth Circuit precedent on this issue. In *Breeland v. Hide-A-Way Lake, Inc.*, 585 F.2d 716 (5th Cir. 1978), the court pointedly held that, "the 'doing business' provision of the Mississippi long-arm statute may not be invoked by

> a nonresident plaintiff and that the statute, so construed, does not deny a nonresident plaintiff privileges and immunities secured under the Constitution. *Id.* at 721."

Pet. App. 4.

However, the precedent that was cited, *Breeland v. Hide-A-Way Lake,* does not stand on much of a foundation. *Breeland* did not examine the privileges and immunities question beyond relying on the earlier case of *Sugg v. Hendrix* , 142 F.2d 740 (5th Cir. 1944). *See Breeland*, 585 F.2d at 721. But *Sugg* dealt with whether the state violated the Privileges and Immunities Clause by allowing service of process through the Secretary of State on *nonresident defendants* doing business in Mississippi. That is an entirely different question from the one posed in *Breeland* and in the present case.

Because the Fifth Circuit has interpreted the Mississippi long-arm statute to condition access to the courts in certain situations on residency, this case gives this Court an opportunity to revisit the issue. Decisions from this Court since *Douglas* in 1929 and *Mayfield* in 1950 show that the residency/citizenship distinction in those cases is no longer viable. *See Piper*, 470 U.S. at 278 n.6.

Moreover, this Court's decisions show the Fifth Circuit was wrong in its cursory resolution of the Art. IV, § 2 question. In *Piper*, this Court held that a state violates the Privileges and Immunities Clause if it excludes nonresident lawyers from membership in the state bar. The Court said that "the practice of law falls within the ambit of the Privileges and Immunities Clause." 470 U.S. at 281. Like the practice of law, access to the courts also implicates the protections of the Privileges and Immunities Clause. Indeed, the Court's opinion in *Piper* noted the following:

> In *Corfield v. Coryell*, 6 F. Cas. 546 (No. 3,230) (CCED Pa. 1825), Justice Bushrod Washington, sitting as Circuit Justice, stated that the "fundamental rights" protected by the Clause included:
>
> > "The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ or habeas corpus; *to institute and maintain actions of any kind in the courts of the state;* to take, hold and dispose of property, either real or personal . . . ." *Id.* at 552.
>
> . . . .
>
> The "natural rights" theory that underlay *Corfield* was discarded long ago. . . . Nevertheless, we have noted that those privileges on Justice Washington's list would still be protected by the Clause. *Baldwin v. Montana Fish & Game Comm'n*, 436 U.S. 371, 387 (1978).

470 U.S. at 281 n.10 (emphasis added).

Indeed, a long line of cases makes it clear that access to courts lies at the heart of Art. IV, § 2. *See, e.g., McKnett v. St. Louis & S.F. Ry. Co.*, 292 U.S. 230, 233 (1934) ("[t]he privileges and immunities clause . . . requires a state to accord to citizens of other states substantially the same right of access to its courts as it accords to its own citizens"); *Blake v. McClung*, 172 U.S. 239, 256 (1898) ("a state cannot forbid citizens of other states from suing in its courts, that right being enjoyed by its own people"); *Cole v. Cunningham*, 133 U.S. 107, 113-14 (1890) ("[t]he intention of section 2, art. 4, was to

confer on the citizens of the several states a general citizenship, and to communicate all the privileges and immunities which the citizens of the same state would be entitled to under the like circumstances; and this includes the right to institute actions"); *Ward v. Maryland*, 79 U.S. 418, 430 (1870) ("the [Privileges and Immunities] clause plainly and unmistakably secures and protects the right of a citizen of one State to pass into any other State of the Union . . . to maintain actions in the courts of the State").

This is supported by Justice Brennan's concurring opinion for himself and three other Justices in *Burnham v. Superior Court of California*, 495 U.S. 604 (1990), where he said:

> [T]he Privileges and Immunities Clause of Article IV prevents a state government from discriminating against a transient defendant by denying him the protections of its law or the right of access to its courts. *See Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 281, n.10 (1985); *Baldwin v. Fish and Game Comm'n*, 436 U.S. 371, 387 (1978); *see also Supreme Court of Virginia v. Friedman*, 487 U.S. 59, 64-65 (1988). Subject only to the doctrine of forum non conveniens, *an out-of-state plaintiff may use state courts in all circumstances in which those courts would be available to state citizens.*

Id. at 638 (Brennan, J., concurring) (emphasis added). There was no majority opinion in *Burnham* and none of the opinions of the other Justices disagreed with Justice Brennan's statement to this effect. Indeed, Justice Scalia's opinion for himself and (in relevant part) two other Justices agreed that an out-of-state visitor would be permitted to appear in a state's courts as a plaintiff. 495 U.S. at 623-624.

When a state prohibits nonresidents from access to its

courts on the same basis as residents, it is discriminating in an arena that, like the practice of law, "is important to the national economy." *Piper*, 470 U.S. at 281. The Respondent here, Reef Resorts, makes reservations, solicits customers, and runs much of its business through its United States office located in Laurel, Mississippi, where its executive vice-president for operations and two of its directors live. (Record, 51-97). As such, that office does business with residents of many if not all of the 50 states. Preventing residents of the other 49 states from seeking economic redress in the Mississippi courts on the same basis as residents of Mississippi clearly implicates the Privileges and Immunities Clause, which "was intended to create a national economic union." *Id.* at 280.

While the Fifth Circuit's holding here, like that of the Texas Supreme Court in *Owens-Corning*, has closed a state's courthouse doors in certain situations to nonresidents, this situation is even more egregious than *Owens-Corning*. That case involved a forum non conveniens provision that still allowed nonresident plaintiffs to sue in other states. But discrimination in a long-arm statute can leave American citizens who are nonresidents of the forum state without redress in any American court for injuries suffered at the hands of a company that does business in this country but is incorporated elsewhere. If that company does business in only one of the fifty states, and that state prevents residents of the other 49 states from using the doing-business provision of its long-arm statute, American citizens from those other 49 states injured by the company while traveling outside the United States will generally be closed out of American courtrooms and forced to litigate their claims in a foreign land.

The Fifth Circuit's decision here is all the more troubling given that the doing-business portion of the Mississippi statute does not draw a distinction between residents and nonresidents, and neither do any of the decisions of the Mississippi courts.

While the Mississippi courts have never addressed this precise issue (inasmuch as most cases brought by nonresident plaintiffs against nonresident defendants are removed to federal court), the language in some of the state court opinions demonstrates a sensitivity to the Privileges and Immunities Clause that the Fifth Circuit, unfortunately, has never displayed. *See, e.g., Shewbrooks v. A.C. & S., Inc.*, 529 So.2d 557, 561 (Miss. 1988) ("[n]either can state courts make a distinction in access to its courts between in- and out-of-state citizens"); *Hogrobrooks v. Progressive Direct*, 858 So.2d 913, 917 (Miss. App. 2003) ("[t]he privileges and immunities clause [of the federal constitution] requires a state to accord to citizens of other states substantially the same right of access to its courts as it accords to its own citizens") (quoting *Howlett v. Rose*, 496 U.S. 356, 382 n.26 (1990)).

But the Fifth Circuit continues to interpret the statute to preclude nonresidents from using the doing-business provision, leading to some 30 reported and cited cases where the claims of nonresident plaintiffs under that provision have been rejected by federal courts. Pet. App. 29. By creating a distinction over the last twenty-five years between residents and nonresidents that neither Mississippi's legislature nor its courts have adopted, the Fifth Circuit has consigned nonresidents to an unequal status that closes the courthouse doors and prevents them from invoking the doing-business clause in situations where residents can invoke it.

Because of the confusion in the lower courts, as illustrated by the decisions of the Fifth Circuit in the present case and the Texas Supreme Court in *Owens Corning*, both of which discriminate against nonresident plaintiffs in matters of access to courts; because of the need for this Court to revisit *Douglas* and *Mayfield* in light of its own later decisions that contradict those holdings; and because this case raises the unresolved but fundamental question of whether states can discriminate against

nonresident plaintiffs in their long-arm statutes, certiorari should be granted on the Art. IV, § 2 privileges and immunities question.

II. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFUSION THAT EXISTS OVER WHETHER A DEATH OR INJURY THAT OCCURS WHILE SCUBA DIVING FROM A SEAGOING VESSEL IN NAVIGABLE WATERS CAN CONSTITUTE A MARITIME TORT GIVING RISE TO ADMIRALTY JURISDICTION.

If personal jurisdiction over Reef Resorts does not exist under Mississippi law, the question arises of whether it is available under Fed. R. Civ. P. 4(k)(2), which provides personal jurisdiction over "claims arising under federal law . . . [against] any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state." If this case sounds in admiralty, it is a "claim[] arising under federal law." But there is a great deal of confusion in the lower courts over whether scuba diving cases are maritime torts falling within the scope of admiralty jurisdiction. The Court of Appeals here held that this case is not, saying the "recreational scuba activity in this case did not affect maritime commerce, and . . . [was] not connected with traditional maritime activity." Pet. App. 6.

But the type of incident here is a death involving scuba diving staged and negligently supervised from a boat in navigable waters. This "type of incident . . . has a potentially disruptive impact on maritime commerce," *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534 (1995), because it involves a boat traveling through and located in navigable waters, as well as distress calls and trips to the scene by other boats in a search for the missing person. Pet. App. 5-6. The incident also "has a substantial relationship to traditional maritime activity," *Grubart,* 513 U.S. at 534,

because boats are the usual means for transporting divers to dive locations in navigable waters.

While the lower courts generally hold that where a scuba diver is injured by the boat itself or is the victim of negligence while on the boat, admiralty jurisdiction exists, *see Neely v. Club Med Mgm't Svcs., Inc.*, 63 F.3d 166, 170, 172, 178-80 (3d Cir. 1995) (en banc) (plaintiff injured when she was sucked into the dive boat propellers after entering the water for a dive), the courts are divided about admiralty jurisdiction where a scuba diver dies off the boat. The Eleventh Circuit's decision in *Shultz v. Florida Keys Dive Center*, 224 F.3d 1269 (11th Cir. 2000), contains an interesting discussion of the various positions. In *Shultz*, the decedent surfaced from the dive, was too far away to swim back to the boat, was not immediately picked up by the boat's crew because they were picking up other divers, became unconscious before the boat reached her, and died. *Id.* at 1270. Even though the death occurred in the water and was not caused by the boat itself, the district court held that admiralty jurisdiction existed and the Eleventh Circuit apparently agreed.

> The district court in this case held there was admiralty jurisdiction because "by transporting individual scuba divers from shore to dive off of a vessel, the Defendants were performing an activity traditionally performed by vessels." We see no reason to disturb this decision.

Id. at 1272.

At the same time, the Eleventh Circuit said "the jurisdictional issue is not entirely free from doubt." *Id.* It pointed to a Florida intermediate appellate court decision, *Borden v. Phillips,* 752 So.2d 69, 72-73 (Fla. Dist. Ct. App. 2000), and two Hawaii federal district court cases, *In re Kanoa,*

Inc., 872 F.Supp. 740 (D. Haw. 1994), and *Tancredi v. Dive Makai Charters*, 823 F.Supp. 778 (D. Haw. 1993), where the courts held that admiralty jurisdiction was unavailable when scuba divers died away from the boat. But the Eleventh Circuit then mentioned that the Hawaii federal district court, in the later case of *McClenahan v. Paradise Cruises, Ltd.*, 888 F.Supp. 120, 121-23 (D. Haw. 1995), said that its earlier decisions in *Kanoa, Inc.* and *Tancredi* had been overruled at least in part by this Court's reasoning in *Grubart*.

The Eleventh Circuit then pointed to *Cutchin v. Habitat Curacao*, 1999 AMC 1377, 1380-81, 1999 WL 33232277 at *1 & 2 (S.D. Fla. 1999), and *Kuntz v. Windjammer "Barefoot" Cruises, Inc.*, 573 F.Supp. 1277, 1280-82 (W.D. Pa. 1983), *aff'd*, 738 F.2d 423 (3rd Cir.) (table), *cert. denied*, 469 U.S. 858 (1984). The Eleventh Circuit described both of those cases by saying "admiralty jurisdiction was held to exist in a case involving recreational scuba diving, despite the absence of direct involvement of a boat." 224 F.3d at 1272-73. And then the Eleventh Circuit mentioned the Third Circuit's decision in *Sinclair v. Soniform, Inc.*, 935 F.2d 599, 600 (3d Cir. 1991), where, in the words of the Eleventh Circuit, "[a]dmiralty jurisdiction also existed where the dive boat crew failed to render medical assistance to a diver after *reboarding* the dive boat." *Schultz*, 224 F.3d 1273 (emphasis in original). *See also Olivelli v. Sappo Corp., Inc.*, 225 F.Supp.2d 109, 111, 114 (D. P.R. 2002) (where decedent suffered a fatal air embolism as she was finishing an offshore scuba dive, and collapsed as she hoisted herself onto the dive platform connected to the boat, admiralty jurisdiction is proper because "by transporting divers from shore to dive off a vessel, the Defendants were performing [at least in part] an activity traditionally performed by vessels") (quoting *Schultz*, 224 F.3d at 1272).

This is a federal law issue that arises frequently. Certiorari should be granted to resolve it and eliminate the

confusion that exists in the lower courts.

CONCLUSION

For the foregoing reasons, and on the basis of the authorities cited, a writ of certiorari should issue to review the decision of the Fifth Circuit in this case.

Respectfully Submitted,

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UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 03-60611

MARIBEL DELGADO, as personal representative of the estate of Ruben Delgado, M.D., for the benefit of the estate of Ruben Delgado, M.D.; Maribel Delgado, individually, and on behalf of plaintiffs Ruben Delgado, III and Gabriel Delgado, surviving minor heirs of Ruben Delgado, Deceased,

Plaintiff-Appellant,

VERSUS

REEF RESORT LIMITED, a corporation, doing business as Ramon's Village Resort; HEADRICK COMPANIES INC; JOHN DOES, doing business as Ramon's Village Resort,

Defendants-Appellees.

Appeal from the United States District Court For the Southern District of Mississippi

(Filed April 13, 2004)

Before DAVIS, BARKSDALE and PRADO, Circuit Judges,

W. EUGENE DAVIS, Circuit Judge:

Plaintiff Maribel Delgado ("Delgado") challenges the district court's order dismissing her tort suit against Reef Resort Limited ("Reef") for lack of personal jurisdiction. We affirm the district court's dismissal.

I.

Dr. Reuben Delgado ("Dr. Delgado") never surfaced during a recreational scuba diving trip off the coast of Belize in August 2001. He is presumed dead. The scuba trip was organized by Ramon's Village Resort, which is operated by defendant Reef Resort Ltd. ("Reef") and the Headrick Companies, Inc. ("Headrick"). Headrick is a resident of Mississippi. Reef is a resident of Belize but allegedly does business in Mississippi.

Maribel Delgado ("Delgado"), Dr. Delgado's wife and a Florida resident, brought suit in Mississippi state court on behalf of herself, her two children, and Dr. Delgado's estate for the negligence of Reef during the scuba expedition. Reef removed the case to federal court. Defendants Reef and Headrick then moved to dismiss for lack of personal jurisdiction. The court denied Headrick's motion on grounds that jurisdiction over Headrick exists under the Mississippi long arm statute because Headrick is a corporate citizen of Mississippi. Reef, a Belize company, argued that the Mississippi long-arm statute does not permit non-resident suits against non-resident corporations merely doing business in Mississippi and further that personal jurisdiction under Fed. R. Civ. P. 4(k)(2) is not appropriate since the case does not arise under the court's admiralty jurisdiction. The district court agreed and dismissed the case against Reef for lack of jurisdiction. Delgado now challenges that ruling.

II.

We review *de novo* dismissal for lack of personal jurisdiction under Rule 12(b)(2). *See Jobe v. ATR Marketing, Inc.*, 87 F.3d 751, 753 (5th Cir. 1996).

Federal courts sitting in diversity may exercise personal jurisdiction over a non-resident where the state long-arm statute grants jurisdiction and the exercise of jurisdiction is consistent with federal due process. *See Latshaw v. Johnston,* 167 F.3d 208, 211 (5th Cir. 1999). The question raised in this case is whether the Mississippi long-arm statute confers jurisdiction over Reef.

The Mississippi long-arm statute provides in relevant part:

> Any nonresident person, firm, general or limited partnership, or any foreign or other corporation not qualified under the Constitution and laws of this state as to doing business herein, who shall make a contract with a resident of this state to be performed in whole or in part by any party in this state, or who shall commit a tort in whole or in part against a resident or nonresident of this state, or who shall do any business or perform any character of work or service in this state, shall by such act or acts be deemed to be doing business in Mississippi and shall thereby be subjected to the jurisdiction of the courts of this state.

Miss.Code § 13-3-57.

This court has, on numerous occasions, interpreted the Mississippi statute to mean that non-residents may not sue non-resident corporations doing business in Mississippi. *See, e.g., Submersible Sys., Inc. v. Perforadora Central, S.A.,* 249 F.3d 413, 418 (5th Cir. 2001); *Herrley v. Volkswagen of America, Inc.,* 957 F.2d 216, 216 (5th Cir. 1992) (per curiam). No intervening change in state statute or case law has occurred that would allow us to abandon the existing circuit precedent. Therefore, based on binding

precedent from this court the Mississippi long-arm statute does not permit Delgado, a resident of Florida, to bring suit against Reef, a resident of Belize, despite the fact that Reef does business in Mississippi.

Delgado argues that this court's precedent interpreting the Mississippi long-arm statute violates the Privileges and Immunities Clause of Article IV of the United States Constitution. Once again we are bound by Fifth Circuit precedent on this issue. In *Breeland v. Hide-A-Way Lake, Inc.*, 585 F.2d 716 (5th Cir. 1978), the court pointedly held that, "the 'doing business' provision of the Mississippi long-arm statute may not be invoked by a nonresident plaintiff and that the statute, so construed, does not deny a nonresident plaintiff privileges and immunities secured under the Constitution." *Id.* at 721.

Delgado argues that the *Breeland* precedent has been abrogated by intervening Supreme Court caselaw, namely *Supreme Court of New Hampshire v. Piper,* 470 U.S. 274 (1985). *Piper,* however, did not purport to change the Privileges and Immunities law the court established in *Breeland.* Rather, the Supreme Court in *Piper* merely applied long existing law to unique facts that have little or no relationship to the case at bar. We are, therefore, bound by the *Breeland* precedent which holds that the Mississippi long-arm statute does not violate the Privileges and Immunities Clause.

We therefore agree with the district court that the Mississippi long-arm statute does not confer jurisdiction over Reef.

III.

Delgado also seeks to invoke jurisdiction under Fed. R. Civ. P. 4(k)(2) based on admiralty jurisdiction.

Rule 4(k)(2) provides service of process and personal jurisdiction in any district court for cases arising under federal law where the defendant has minimum contacts with the United States as a whole sufficient to satisfy due process concerns and the defendant is not subject to jurisdiction in any particular state:

> If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service is also effective, with respect to claims arising under federal law, to establish personal jurisdiction over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state.

Fed. R. Civ. P. 4(k)(2). This court has held that Rule 4(k)(2) applies to cases sounding in admiralty since admiralty suits arise under federal law. *World Tanker Carriers Corp. v. MV Ya Mawlaya,* 99 F.3d 717, 723 (5th Cir. 1996).

Delgado argues that Dr. Delgado's death resulted from a maritime tort and thus gives rise to admiralty jurisdiction. In support of her position she asserts that 1) Dr. Delgado was transported to the dive site by vessel, 2) improper preparations were made for the dive, many of which would or should have occurred on the vessel on the way to the dive, 3) the negligence of the dive crew caused disruption of maritime commerce because it generated numerous distress calls, and 4) at the time of Dr. Delgado's death he was being supervised by members of the vessel's crew. The district court rejected Delgado's attempted

invocation of admiralty jurisdiction finding no connection to maritime commerce or traditional maritime activity.

We agree with the district court that the scuba accident in this case did not result from a maritime tort. In order for an accident to be a maritime tort so as to trigger admiralty jurisdiction, the mishap must occur on navigable waters, the accident must affect maritime commerce, and the activities leading to the tort must be connected to traditional maritime activity. *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534 (1995). The activity surrounding the recreational scuba diving activity in this case did not affect maritime commerce, and these activities are not connected with traditional maritime activity. Therefore, the district court correctly concluded that Dr. Delgado's death did not result from a maritime tort and that admiralty jurisdiction does not attach on that basis.

Recognizing that admiralty jurisdiction might nevertheless attach to Delgado's Death on the High Seas Act claim, 46 App. U.S.C. § 761 et seq. ("DOHSA"), we requested and received briefing on the issue of whether DOHSA conferred federal admiralty jurisdiction in this case allowing the application of Rule 4(k)(2). Although Delgado made the general argument that this case came within the court's admiralty jurisdiction, she did not make the specific argument to the district court that DOHSA could serve as a basis for federal admiralty jurisdiction. Delgado's failure to make this argument to the district court constitutes a forfeiture of the argument and we are left to review the issue for plain error only. *See Crawford v. Falcon Drilling Co., Inc.*, 131 F.3d 1120, 1123 (5th Cir. 1997)

Under plain error review we reverse only where there is "error that is plain and that affects substantial rights." *United States v. Olano,* 507 U.S. 725, 732 (1993). Moreover, reversal is in the sound discretion of the appellate court and "the court should not exercise that discretion unless the error seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id.*

While DOHSA plainly provides admiralty jurisdiction in this case,[1] and the failure to sustain jurisdiction based on DOHSA affected Delgado's substantial rights, the error does not seriously impact the fairness, integrity, or public reputation of the judicial proceeding. We therefore decline to exercise our discretion to reverse the district court's ruling.

IV.

For the reasons stated above we affirm the district court's order dismissing the claims against Reef for lack of personal jurisdiction.

AFFIRMED.

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[1] *See Offshore Logistics, Inc. v. Tallentire,* 477 U.S. 207, 218 (1986) ("[A]dmiralty jurisdiction is expressly provided under DOHSA [where] the accidental death[ ] occur[s] beyond a marine league from [the] shore [of the United States]."); *Jacobs v. N. King Shipping Co., Ltd.,* 180 F.3d 713, 717-18 (5th Cir.1999) ("DOHSA created a remedy in admiralty for deaths occurring more than three miles from shore as a result of wrongful act, neglect, or default.").

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

MARIBEL DELGADO, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF RUBEN DELGADO, M.D., FOR THE BENEFIT OF THE ESTATE OF RUBEN DELGADO; MARIBEL DELGADO, INDIVIDUALLY, AND ON BEHALF OF PLAINTIFFS, RUBEN DELGADO, III, AND GABRIEL DELGADO, SURVIVING MINOR HEIRS OF RUBEN DELGADO, DECEASED **PLAINTIFFS**

VS. **CIVIL ACTION NO. 3:02CV1517BN**

REEF RESORTS LIMITED, A CORPORATION, D/B/A RAMON'S VILLAGE RESORT, THE HEADRICK COMPANIES, INC. AND DEFENDANTS A, B, AND C D/B/A RAMON'S VILLAGE **DEFENDANTS**

OPINION AND ORDER

(Filed Jan. 24, 2003)

This cause is before the Court on the Motion of Defendants to Dismiss for lack of personal jurisdiction and improper venue. Having considered the Motion, Response, Rebuttal, and supporting and opposing authority, the Court finds that the Motion should be granted as to Defendant Reef Resort Limited, and that the Motion should be denied as to Defendant the Headrick Companies.

I. BACKGROUND AND PROCEDURAL HISTORY

On August 5, 2001, Ruben Delgado ("Delgado," or "the Deceased") went on a scuba diving excursion off the coast of Belize. Plaintiffs allege that the excursion was sponsored, operated, and supervised by Ramon's Village Resort ("Ramon's"), and that Ramon's is owned, operated, and/or maintained by Reef Resorts Limited ("Reef Resorts") and the Headrick Companies, Inc. ("Headrick"). At the time of his death, Delgado was participating in a scuba dive in Belize offered by Ramon's. He disappeared during the dive and is presumed to be dead. Plaintiffs allege that Ramon's was negligent in giving decedent instruction and in supervising the dive.

Plaintiff Maribel Delgado is the Deceased's surviving wife, personal representative of his estate, and mother of their two minor sons. Plaintiff has filed this wrongful death suit on behalf of Delgado.[1] Plaintiff, the deceased, and the minor children are all citizens of the State of Florida. All acts giving rise to this suit took place in Belize. The Deceased was also a resident of Florida at the time of his death.

Defendants allege that Ramon's is owned by Reef Resorts, and that Reef Resorts is a corporate citizen of the country of Belize. Defendants further allege that Reef Resorts is not authorized to do business in the State of Mississippi, does not have a registered agent in the State of Mississippi, does not have any offices in the State of

[1] Plaintiffs originally filed this suit in the First Judicial District Court in Hinds County, Mississippi. Defendants removed the suit to this Court, claiming diversity jurisdiction. Defendants have not filed a motion to remand, and have agreed that this Court has subject matter jurisdiction over the suit.

Mississippi, does not own or rent any property in the State of Mississippi, does not advertise in any newspapers in the State of Mississippi, has not had any employee attend any travel shows, conventions, or trade shows in the State of Mississippi, has not sold any products or services in the State of Mississippi, and does not pay taxes in the State of Mississippi. Declaration of Steven Sherwin. Plaintiff has submitted numerous exhibits such as internet advertisements of Ramon's giving a Laurel, Mississippi, address. Defendant Headrick is apparently headquartered in Laurel, Mississippi. According to the declaration of Sherwin, Headrick employees in Laurel take reservations for Ramon's and perform bookkeeping services for it. Although Headrick may own Ramon's, apparently it has been careful to establish and keep the corporate identity of Ramon's in Belize.

Plaintiffs allege that Headrick is a corporate citizen of the State of Mississippi. Defendants do not dispute that allegation. However, Defendants allege that Headrick does not own, operate, manage, or control Ramon's and was fraudulently joined by Plaintiffs to defeat federal jurisdiction.

The primary issue before the Court is whether this Court has personal jurisdiction over any and/or all Defendants. If personal jurisdiction is lacking, the Motion to Dismiss is due to be granted. If personal jurisdiction is found, then Court must also determine whether venue is proper.

II. ANALYSIS

As an initial matter, the Court notes that Defendants have focused their argument on whether the Court has

personal jurisdiction over Reef Resorts. Regarding Headrick, Defendants make only a single conclusory statement that Headrick was fraudulently joined. The burden is on Defendants to prove fraudulent joinder. *Laughlin v. Prudential Ins. Co.*, 882 F.2d 187, 190 (5th Cir. 1989); *Carriere v. Sears, Roebuck & Co.*, 893 F.2d 98, 100 (5th Cir. 1990), *cert. denied* 498 U.S. 817 (1990). Defendants do not deny Plaintiffs' allegation that Headrick is a corporate citizen of the State of Mississippi. Defendants assert no argument that personal jurisdiction over Headrick is lacking. Based on the record, the Court finds that Defendants have not met their burden of establishing that Headrick was fraudulently joined or that personal jurisdiction is lacking. Accordingly, the Motion to Dismiss is denied as to Defendant Headrick.

A. SUBJECT MATTER JURISDICTION

Before analyzing the issue of personal jurisdiction, the Court notes that two independent grounds for subject matter jurisdiction have been asserted in this suit. First, as there appears to be complete diversity among the parties and an amount in controversy in excess of $75,000, the Court has diversity of citizenship jurisdiction. Additionally, the Amended Complaint[2] filed by Plaintiffs also asserts that the suit falls within the admiralty jurisdiction of the Court.

As Defendants have alleged a lack of personal jurisdiction, the Court must consider whether the requirements for personal jurisdiction differ with regard to either

[2] Plaintiffs amended the original Complaint prior to any responsive pleading being served in accordance with Federal Rule of Civil Procedure 15(a).

admiralty or diversity of citizenship jurisdiction here, and also whether those requirements are met.

B. PERSONAL JURISDICTION

1. ANALYSIS BASED ON DIVERSITY JURISDICTION

For a federal court sitting in diversity, the determination of whether personal jurisdiction exists over a nonresident defendant requires a two step inquiry: (1) whether the long-arm statute of the state in which the federal court sits grants the court jurisdiction, and (2) if so, whether that grant of jurisdiction comports with due process. *Allred v. Moore & Peterson*, 117 F.3d 278, 281 (5th Cir. 1997). Therefore, "[a] federal district court sitting in diversity may exercise personal jurisdiction only to the extent permitted a state court under applicable state law." *Id.*

The Mississippi long-arm statute is found in § 13-3-57 of the Mississippi Code:

> Any nonresident person, firm, general or limited partnership, or any foreign or other corporation not qualified under the Constitution and laws of this state as to doing business herein, who shall make a contract with a resident of this state to be performed in whole or in part by any party in this state, or who shall commit a tort in whole or in part in this state against a resident or nonresident of this state, or who shall do any business or perform any character of work or service in this state, shall by such act or acts be . . . subjected to the jurisdiction of the courts of this state.

A court may, therefore, exercise jurisdiction over a defendant under this statute only if one of three situations exist: (1) the defendant entered into a contract with a Mississippi resident, to be performed in whole or in part in Mississippi, (2) the defendant committed at least some element of a tort in Mississippi, or (3) the defendant did business in Mississippi. The jurisdiction conferred by the Mississippi long-arm statute is not coextensive with the limits of due process. *Allred*, 117 F.3d at 282.

Because Plaintiffs here are not residents of the State of Mississippi, they "may not take advantage of the contract portion of the Mississippi long-arm statute. . . . [or] the doing business portion of the Mississippi long-arm statute." *Submersible Systems, Inc. v. Perforadora Central, S.A. de C.V.*, 249 F.3d 413, 418 (5th Cir. 2001).[3] Furthermore, any tort committed by Defendants herein was committed in Belize. Thus, Plaintiffs "may not take advantage of the tort portion of the Mississippi long-arm statute." *Id.* Therefore, the Mississippi long-arm statute does not grant the Court personal jurisdiction over Reef Resorts.

2. ANALYSIS BASED ON ADMIRALTY JURISDICTION

"Absent a federal statute that provides for more expansive personal jurisdiction," the matter would be

[3] Plaintiffs recognize that this Court is bound by the holding of *Submersible Systems* and its predecessors but point out that the Mississippi Supreme Court has never directly ruled that the Mississippi long arm statute is unavailable to non-residents, and argue that the United States Court of Appeals for the Fifth Circuit has misapplied that statute.

decided. *See Submersible Systems*, 249 F.3d at 418. Here, however, Plaintiffs claim the more expansive personal jurisdiction provided by the laws of admiralty. Plaintiffs cite Federal Rule of Civil Procedure 4 (k) (2):

> If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service is also effective, with respect to claims arising under federal law, to establish personal jurisdiction over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state.

"[C]laims falling within the admiralty jurisdiction of the federal courts are claims arising under federal law for the purposes of Rule 4 (k) (2)." *Submersible Systems* at 420.

Defendants argue, however, that Plaintiffs' claims do not arise under admiralty law. Defendants correctly note that all allegations made in the Amended Complaint involve planning, supervising, and warning Delgado regarding the scuba dive excursion in Belize. Defendants note also that no allegations in the Amended complaint involve Defendants transporting Delgado to the dive location or any other activity involving a boat or vessel.

The United States Supreme Court has set forth a test for determining whether a claim arises under admiralty law:

> a party seeking to invoke federal admiralty jurisdiction . . . over a tort claim must satisfy conditions both of location and of connection with maritime activity. A court applying the location test must determine whether the tort occurred on navigable water or whether injury suffered on land was caused by a vessel on navigable water.

> The connection test raises two issues. A court, first, must assess the general features of the type of incident involved to determine whether the incident has a potentially disruptive impact on maritime commerce. Second, a court must determine whether the general character of the activity giving rise to the incident shows a substantial relationship to traditional maritime activity.

Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 534 (1995) (internal quotation marks and citations omitted).

The location test should not be applied in a purely technical way. Rather, the wrong of which plaintiffs complain should bear a "significant relationship to traditional maritime activity." *Id.* at 533. Thus, admiralty jurisdiction is not implicated by injuries caused by two swimmers colliding, or where an airplane collides with a flock of birds and crashes into a navigable waterway. *Id.*

At the heart of admiralty jurisdiction is a traditional concern over maritime commerce. *Id.* However, a collision between two "pleasure boats" implicated admiralty jurisdiction because of the "potential[ly] disruptive impact upon maritime commerce of a collision between boats on navigable waters, when coupled with the traditional concern that admiralty law holds for navigation." *Id.* (internal quotation marks and citations omitted).

A purely technical application of the location test would indicate that Plaintiff alleges that various acts of negligence occurred on navigable waters off the coast of Belize. However, the Court notes, without so holding, that the location test is probably not met here. Although the Supreme Court never expressly states that the wrong of

which a plaintiff claims must involve the operation of vessels, the Court strongly implies such. In the case *sub judice*, such a requirement would not be met. Instead, the various alleged acts of negligence involve acts that bear no relationship to the transportation from shore to the dive location.

However, the Court finds it unnecessary to determine whether the location test is satisfied, because it is clear that the connection test is not met. The acts giving rise to this litigation involve preparations for scuba diving, warnings about scuba diving, and supervision of scuba diving. None of the acts giving rise to this litigation have a potentially disruptive impact on maritime commerce, and none of the acts giving rise to this litigation bear a substantial relationship to traditional maritime activity. Instead, the acts giving rise to this litigation are more closely analogous to the example of two swimmers colliding in a navigable body of water.

The Court finds that Plaintiffs' claims do not arise under admiralty law. Therefore, Federal Rule of Civil Procedure cannot expand personal jurisdiction here beyond what is allowed by the State of Mississippi. Additionally, it is unnecessary for the Court to conduct an analysis of whether exercising personal jurisdiction here would comport with due process. The Motion to Dismiss Defendant Reef Resorts is granted for lack of personal jurisdiction.

III. CONCLUSION

IT IS THEREFORE ORDERED that the Motion of Defendants to Dismiss [4-1] is hereby granted as to

Defendant Reef Resorts. Defendant Reef Resorts is hereby dismissed without prejudice.

IT IS FURTHER ORDERED that the Motion of Defendants to Dismiss is denied as to Defendant Headrick.

SO ORDERED this the 24th day of January, 2003.

/s/ William Barbour
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

MARIBEL DELGADO, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF RUBEN DELGADO, M.D., FOR THE BENEFIT OF THE ESTATE OF RUBEN DELGADO; MARIBEL DELGADO, INDIVIDUALLY, AND ON BEHALF OF PLAINTIFFS, RUBEN DELGADO, III, AND GABRIEL DELGADO, SURVIVING MINOR HEIRS OF RUBEN DELGADO, DECEASED **PLAINTIFFS**

VS. **CIVIL ACTION NO. 3:02CV1517BN**

REEF RESORTS LIMITED, A CORPORATION, D/B/A RAMON'S VILLAGE RESORT, THE HEADRICK COMPANIES, INC. AND DEFENDANTS A, B, AND C D/B/A RAMON'S VILLAGE **DEFENDANTS**

OPINION AND ORDER

(Filed: Apr. 04, 2003)

This cause is before the Court on the Motion of Plaintiffs for Leave to Amend or for Reconsideration, Clarification, and/or Leave to Amend. Plaintiff seeks leave to file a second amended complaint attempting to establish personal jurisdiction, or in the alternative, for the Court to reconsider its January 24, 2003, Order granting the motion of Defendants to dismiss claims against Defendant Reef Resorts Limited ("Reef Resorts") for lack of personal jurisdiction. Having considered the Motion, Response, Rebuttal, and supporting and opposing authority, the Court finds that the Motion for Leave to Amend or for

Reconsideration, Clarification, and/or Leave to Amend is not well taken and should be denied.

I. MOTION TO RECONSIDER

Under Rule 59(e) of the Federal Rules of Civil Procedure, "[t]he court . . . recognizes only three possible grounds for any motion for reconsideration: (1) an intervening change in controlling law, (2) the availability of new evidence not previously available, and (3) the need to correct a clear error of law or prevent a manifest injustice." *Atkins v. Marathon Le Torneau Co.*, 130 F.R.D. 625, 626 (S.D. Miss. 1990) (citing *NRDC v. EPA*, 705 F. Supp. 698, 702 (D.D.C. 1989), vacated on other gronds by 707 F. Supp. 3 (D.D.C. 1989)). *See also Russ v. International Paper Co.*, 943 F.2d 589, 593 (5th Cir. 1991), *cert. denied*, 503 U.S. 987 (1992); *F.D.I.C. v. Cage*, 810 F. Supp. 745, 747 (S.D. Miss. 1993). Litigants considering a Rule 59(e) motion have been "strongly cautioned" to carefully consider the three grounds for such a motion. *Atkins*, 130 F.R.D. at 626, n. 1. "Whatever may be the purpose of Rule 59(e), it should not be supposed that it is intended to give an unhappy litigant one additional chance to sway the judge." *Id.* (citing *Durkin v. Taylor*, 444 F. Supp. 879, 889 (E.D. Va. 1977)). The saine principles apply to a motion under Rule 52(b). *See Fontenot v. Mesa Petroleum Co.*, 791 F.2d 1207, 1219 (5th Cir. 1986).

At issue is the January 24, 2003, Order granting the motion of Defendants to dismiss claims against Reef Resorts for lack of personal jurisdiction.[1] The Court notes that dismissal was granted without prejudice. No final

[1] The motion to dismiss was denied regarding Defendant The Headrick Companies, Inc. ("Headrick").

judgment was entered, as not all claims of Plaintiffs were dismissed.

Regardless, Plaintiff has failed to establish any one of the three grounds for reconsideration. There has clearly been no intervening change of law.[2] Plaintiff has not produced any evidence that was not previously available to it. Nor has Plaintiff persuaded the Court that it made a clear error of law that would result in manifest injustice. The Court therefore finds that the Motion of Plaintiff for Reconsideration is not well taken and should be denied.

III. MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT

In the January 24, 2003, Order, the Court found that it could not exercise personal jurisdiction over Reef Resorts. Plaintiffs sought to establish that their claims arose under admiralty jurisdiction, so that personal jurisdiction would attach to Reef Resorts pursuant to Rule 4(k) (2) of the Federal Rules of Civil Procedure. The Court found, based on the standards established by the United States Supreme Court in *Grubart*, that Plaintiffs' claims do not arise under admiralty law. Thus, Rule 4(k) (2) could not serve to extend the jurisdiction of the Court over Reef Resorts.

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[2] Plaintiffs devote a great deal of their argument to demonstrating that various cases have been overruled or called into question by the decision of the United States Supreme Court in *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527 (1995). The Court notes that the January 24, 2003, Order expressly relied on the standard enunciated in *Grubart*. The Court further notes that the January 24, 2003, Order makes no reference to any other case.

By the present Motion, Plaintiffs seek leave to file a second amended Complaint. Plaintiffs assert that the amended Complaint includes additional allegations demonstrating the existence of admiralty jurisdiction. Rule 15(a) of the Federal Rules of Civil Procedure allows the amendment of a pleading at any time by leave of the court, "and leave shall be freely given when justice so requires." Here, the Court finds that the proposed amended Complaint remains insufficient to demonstrate the existence of admiralty jurisdiction. Even assuming all new allegations asserted by the proposed amended Complaint are true, Plaintiffs' claims against Reef Resorts still fail to meet the connection test of *Grubart*. *See Grubart*, 513 U.S. at 534.

As the Court held in granting the motion of Defendants to dismiss, the acts giving rise to this litigation involve preparations for scuba diving, warnings about scuba diving, and supervision of scuba diving. None of the acts giving rise to this litigation have a potentially disruptive impact on maritime commerce, and none of the acts giving rise to this litigation bear a substantial relationship to traditional maritime activity. Accordingly, Plaintiffs' claims against Reef Resorts do not arise under admiralty law, and no basis exists for the Court to exercise personal jurisdiction over Reef Resorts.

The findings of the Court are not altered by the allegations in the proposed amended Complaint. The Court need not allow amendments that are futile. *Smith v. Ayres*, 845 F.2d 1360, 1366 (5th Cir. 1988). Here, the proposed amended Complaint would still be subject to dismissal for lack of personal jurisdiction over Reef Resorts. *See Addington v. Farmer's Elevator Mut. Ins. Co.*, 650 F.2d 663, 667 (5th Cir. 1981) ("if the complaint as

amended would still be subject to dismissal," the district court is within its discretion in denying the amendment). Accordingly, the Motion for Leave to Amend is not well taken and should be denied.

IV. MOTION TO EXTEND DEADLINES FOR DISCLOSURE OF EXPERT REPORTS

Also pending in this action–is a Motion to Extend Deadlines for Disclosure of Expert Reports. The parties have represented to the Court that they are in agreement regarding the need to extend these deadlines. The Court finds the Motion to be well-taken, and it is hereby granted.

V. CONCLUSION

IT IS THEREFORE ORDERED that the Motion of Plaintiffs for Leave to Amend or for Reconsideration, Clarification, and/or Leave to Amend [26-1, 26-2] is hereby denied.

IT IS FURTHER ORDERED that the Motion to Extend Deadlines for Disclosure of Expert Reports [32-1] is hereby granted. Plaintiffs shall disclose their experts' reports on or before May 5, 2003. Defendants shall disclose their experts' reports on or before June 5, 2003. All other expert witness information shall be disclosed on the dates set forth in the Case Management Order.

SO ORDERED this 3rd day of April, 2003.

/s/ William Barbour
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

MARIBEL DELGADO, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF RUBEN DELGADO, M.D., FOR THE BENEFIT OF THE ESTATE OF RUBEN DELGADO; MARIBEL DELGADO, INDIVIDUALLY, AND ON BEHALF OF PLAINTIFFS, RUBEN DELGADO, III AND GABRIEL DELGADO, SURVIVING MINOR HEIRS OF RUBEN DELGADO, DECEASED

PLAINTIFFS

VS. **CIVIL ACTION NO. 3:02CV1517BN**

REEF RESORT LIMITED, A CORPORATION, D/B/A RAMON'S VILLAGE RESORT, THE HEADRICK COMPANIES, INC. AND DEFENDANTS A, B, AND C D/B/A RAMON'S VILLAGE

DEFENDANTS

OPINION AND ORDER

(Filed Jun. 10, 2003)

This cause is before the Court on the Motion of Plaintiffs for Certification Under Federal Rule of Civil Procedure 54(b) and/or 28 U.S.C. § 1292(b), and for Stay of District Court Proceedings. Having considered the Motion, Response, Rebuttal, and supporting and opposing authority, the Court finds that the Motion is well taken and should be granted.

I. BACKGROUND AND PROCEDURAL HISTORY

This suit arises out of the death of Ruben Delgado ("Delgado," or "the Deceased"), during a scuba diving excursion off the coast of Belize. Plaintiffs allege that the excursion was sponsored, operated, and supervised by Ramon's Village Resort ("Ramon's"), and that Ramon's is owned, operated, and/or maintained by Reef Resorts Limited ("Reef Resorts") and the Headrick Companies, Inc. ("Headrick"). At the time of his death, Delgado was participating in a scuba dive in Belize offered by Ramon's. He disappeared during the dive and is presumed to be dead. Plaintiffs allege that Ramon's was negligent in giving decedent instruction and in supervising the dive.

Plaintiff Maribel Delgado is the Deceased's surviving wife, personal representative of his estate, and mother of their two minor sons. Plaintiff has filed this wrongful death suit on behalf of Delgado.[1] Plaintiff, the deceased, and the minor children are all citizens of the State of Florida. All acts giving rise to this suit took place in Belize. The Deceased was also a resident of Florida at the time of his death.

On January 24, 2003, this Court issued an Opinion and Order dismissing Defendant Reef Resorts Limited without prejudice for lack of personal jurisdiction. On April 4, 2003, this Court issued an Opinion and Order denying the motion of Plaintiffs for reconsideration. On April 18, 2003, Plaintiffs filed the present Motion, requesting that the Court

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[1] Plaintiffs originally filed this suit in the First Judicial District Court in Hinds County, Mississippi. Defendants removed the suit to this Court, claiming diversity jurisdiction. Plaintiffs did not file a motion to remand, and agreed that this Court has subject matter jurisdiction over the suit.

certify its previous Orders for appeal pursuant to Fed. R. Civ. P. 54(b), or in the alternative, that the Court amend the previous Orders to certify them for interlocutory appeal pursuant to 28 U.S.C. § 1292(b).[2]

Rule 54(b) authorizes the Court to "direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment." The Rule is "limited to orders that would be 'final' if entered in a simple single-claim, two-party case." *DeMelo v. Woolsey Marine Indus.*, 677 F.2d 1030, 1032 (5th Cir. 1982). Although appeal may sometimes be perfected by the use of either Rule 54(b) or 28 U.S.C. § 1292(b), it is preferable to use Rule 54(b) when it is applicable. *See id.* at 1033.

Here, the Court dismissed Reef Resorts without prejudice after finding that the Court could not exercise

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[2] Plaintiffs state the following questions should be certified for appeal:

> a) Whether the Privileges and Immunities Clause, Art. 4, § 2, Clause 1, of the U.S. Constitution, requires the Mississippi Long-Arm Statute, Miss. Code Ann. § 13-3-57, to be construed to provide the same jurisdictional rights to non-residents as it affords to residents of the State of Mississippi in light of Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 105 S.Ct. 1272 (1985) and its progeny?
>
> b) Whether the allegations of the Second Amended Complaint, including an allegation that the action arose in part from the negligent instructions given by boat captain to a scuba diver, falls within the federal courts' admiralty jurisdiction, 28 U.S.C. § 1333?

Motion of Plaintiffs for Certification Under Federal Rule of Civil Procedure 54(b) and/or 28 U.S.C. § 1292(b), and for Stay of District Court Proceedings.

personal jurisdiction over Reef Resorts pursuant to either the Mississippi long-arm statute, Miss. Code Ann. § 13-3-57, or to federal admiralty jurisdiction, Federal Rule of Civil Procedure 4(k)(2), as interpreted by the United States Supreme Court in *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527 (1995). If this were a simple one-claim, two-party case, the Order of dismissal would clearly be final. Thus, Rule 54(b) is applicable.

The Court finds there to be no just reason for delay or this appeal, and will accordingly enter a final judgment pursuant to Rule 54(b). Because the Court is entering a Rule 54(b) final judgment, there is no need for the Court to consider whether an appeal might also be appropriate under 28 U.S.C. § 1292(b).

IT IS THEREFORE ORDERED that the Motion of Plaintiffs for Certification Under Federal Rule of Civil Procedure 54(b) [39-1] is hereby granted.

IT IS FURTHER ORDERED that all proceedings herein are hereby stayed pending the result of the appeal of this judgment.

A final judgment in accordance with Rule 54(b) of the Federal Rules of Civil Procedure shall be entered this day finally dismissing Defendant Reef Resorts Limited without prejudice.

SO ORDERED this the 9th day of June, 2003.

/s/ William Barbour
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-60611

MARIBEL DELGADO, As personal representative of the estate of Ruben Delgado, M.D. for the benefit of the estate of Ruben Delgado, M.D.; Maribel Delgado, individually, and on behalf of plaintiffs, Ruben Delgado, III and Gabriel Delgado, surviving minor heirs of Ruben Delgado, Deceased

Plaintiff-Appellant

v.

REEF RESORT LIMITED, a corporation, doing business as Ramon's Village Resort; HEADRICK COMPANIES INC; JOHN DOES, doing business as Ramon's Village Resort

Defendants-Appellees

Appeal from the United States District Court for the Southern District of Mississippi, Jackson

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ON PETITION FOR REHEARING EN BANC

(Filed Jun. 29, 2004)

(Opinion 4/13/04, 5 Cir., ___, ___ F.3d ___)

Before DAVIS, BARKSDALE, and PRADO, Circuit Judges.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ W. Eugene Davis
United States Circuit Judge

REPORTED AND CITED FEDERAL CASES REJECTING NON-RESIDENT CLAIMS MADE UNDER THE DOING BUSINESS PRONG OF THE MISSISSIPPI LONG-ARM STATUTE

1. *Submersible Systems, Inc. v. Perforadora Central, S.A.*, 249 F.3d 413 (5th Cir.)

2. *Lifeline Ambulance Svcs., Inc. v. Laidlaw, Inc.*, 16 F.Supp.2d 686 (S.D. Miss. 1998)

3. *Cowart v. Shelby County Health Care Corp.*, 911 F.Supp. 248 (S.D. Miss. 1996) (but allowing personal jurisdiction under tort prong of long arm statute)

4. *Moore Video Distributors, Inc. v. Quest Entertainment, Inc.*, 823 F.Supp. 1332 (S.D. Miss. 1993)

5. *Herrley v. Volkswagen of America, Inc.*, 957 F.2d 216 (5th Cir. 1992)

6. *Wright v. Kelley*, 807 F.Supp. 37 (N.D. Miss. 1992)

7. *Murray v. Remington Arms Co.*, 795 F.Supp. 805 (S.D. Miss. 1991)

8. *Madison v. Revlon, Inc.*, 789 F.Supp. 758 (S.D. Miss. 1991)

9. *Prince v. F. Hoffmann-La Roche & Co., Inc.*, 780 F.Supp. 417 (S.D. Miss. 1991)

10. *Ferry v. Langston Corp.*, 792 F.Supp. 512 (S.D. Miss. 1990)

11. *Bailiff v. Manville Forest Products Corp.*, 792 F.Supp. 509 (S.D. Miss. 1990)

12. *Black v. Carey Canada, Inc.*, C.A. No. S89-0470(G), slip op. at 5 (S.D. Miss. April 2, 1990) (cited in *Prince*, 780 F.Supp. at 419)

13. *Goodman v. Hoffmann-La Roche, Inc.*, C.A. No. J89-0649(B) (S.D. Miss. Jan. 9, 1990) (cited in *Prince*, 780 F.Supp. at 419)

14. *Mills v. Dieco, Inc.*, 722 F.Supp. 296 (N.D. Miss. 1989)

15. *Shover v. Cordis Corp.*, No. J89-0443(W), slip op. at 3-4 (S.D. Miss. October 25, 1989) (cited in *Madison*, 789 F.Supp. at 760)

16. *Acker v. Armstrong World Industries, Inc.*, 1989 WL 268344 (S.D. Miss. 1989) (finding fraudulent joinder of nonresident defendants sued by nonresident plaintiffs under § 13-3-57)

17. *Shover v. Cordis Corporation*, No. J-89-0443(W) at 3-4 (S.D. Miss. October 25, 1989) (cited in *Acker*, 1989 WL 268344 at *4)

18. *Schmid v. Roehm GmbH*, 617 F.Supp. 655 (S.D. Miss. 1985)

19. *Smith v. DeWalt Products Corp.*, 743 F.2d 277 (5th Cir. 1984)

20. *Herrley v. Volkswagen of America, Inc.*, 598 F.Supp. 690 (S.D. Miss. 1984), *aff'd*, *Herrley v. Volkswagen of America, Inc.*, 957 F.2d 216 (5th Cir. 1992)

21. *Manookian v. A.H. Robins Co., Inc.*, 580 F.Supp. 877 (S.D. Miss. 1984), *question certified*, 760 F.2d 567 (5th Cir. 1985). *See Prince*, 780 F.Supp. at 420 ("due to factors not related to the issues certified, the Mississippi Supreme Court did not proceed to a determination of the question in *Manookian*").

22. *Golden v. Cox Furniture Mfg. Co., Inc.*, 683 F.2d 115 (5th Cir.), *reh'rg denied*, 685 F.2d 1385 (5th Cir. 1982) (table)

23. *Shore v. Acands, Inc.*, 644 F.2d 386 (5th Cir. 1981) (noting district court dismissed nonresident defendants because plaintiff was a nonresident)

24. *Thompson v. F.W. Woolworth Co.*, 508 F.Supp. 522 (N.D. Miss. 1981)

25. *Washington v. Norton Mfg., Inc.*, 588 F.2d 441 (5th Cir.), *cert. denied*, 442 U.S. 942 (1979)

26. *Breeland v. Hide-A-Way Lake, Inc.*, 585 F.2d 716 (5th Cir. 1978), *on reh'g*, 593 F.2d 22 (5th Cir. 1979)

27. *Daniels v. McDonough Power Equipment, Inc.*, 521 F.Supp. 488 (S.D. Miss. 1979)

28. *F. L. Crane Co. v. Cessna Aircraft Co.*, 73 F.R.D. 384 (N.D. Miss. 1976)

29. *American International Pictures, Inc. v. Morgan*, 371 F.Supp. 528 (N.D. Miss. 1974)

30. *Ryan v. Glenn*, 52 F.R.D. 185 (N.D. Miss. 1971)